

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



74-2037

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED JEWISH ORGANIZATIONS OF  
WILLIAMSBURGH, INC., et al.,

Plaintiffs-Appellants,

v.

MALCOLM WILSON, et al.,

Defendants-Appellees.

No. 74-2037

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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No. 74-2037

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an order and decision of Senior District Judge Walter Bruchhausen of the Eastern District of New York dismissing the plaintiffs' complaint and denying the plaintiffs' motion for preliminary injunction. The opinion is not reported.

QUESTIONS PRESENTED

1. Whether the Fourteenth and Fifteenth Amendments permit a state legislature, acting on instruction issued by the United States Department of Justice, to gerrymander election districts so as to assign to a specified number of such districts a white population of not more than 35 percent, where there is

no evidence or finding that there has been past racial discrimination or that quotas are needed to correct the effects of past discrimination.

2. Whether, irrespective of past discrimination, racial considerations may ever enter into the legislative apportionment process.

3. Whether the plaintiffs are entitled to relief for the 1974 election.

#### STATEMENT

##### 1. Introduction

This case concerns the constitutionality of a plan of legislative apportionment drawn up by the New York Legislature in a special emergency session convened in late May of this year in response to the disapproval, by the United State Department of Justice, of New York State's 1972 reapportionment insofar as it affects New York and Kings Counties. The appeal comes to this Court approximately one month before the primary election for 1974 -- not, as is demonstrated below, by any fault of the plaintiffs. Other litigation concerning the applicability of the federal Voting Rights Act to certain areas in New York State dragged out into early 1974, and it was not before April 1, 1974, that the Department of Justice announced its conclusion that the 1972 reapportionment was invalid, in part, under the Voting Rights Act. The New York Legislature

took no formal action with regard to this finding until May 29, 1974, when it enacted the legislation here being challenged. From that time on, the plaintiffs have moved, as the recitation below demonstrates, with extraordinary dispatch, including even an attempt to secure review in this Court several weeks ago -- before Judge Bruchhausen issued the formal order which is now the subject of this appeal. We believe -- for reasons fully outlined below -- that the plaintiffs are the victims of patently unconstitutional discrimination, that they have promptly sought judicial relief by every means available, and that a court order correcting the discriminatory action should be entered forthwith -- even though it may result in some disruption of the calendar now fixed for selection of candidates in the affected region of New York State.

2. A Description of the Plaintiffs

The plaintiffs are eight individuals and an "umbrella" community organization which represents the Jewish residents of the Williamsburgh area of Brooklyn. All the individuals are voters registered at their home addresses in the area, and their complaint alleges that the effect of the challenged reapportionment is to dilute their vote, solely because of their race, in violation of the Fourteenth and Fifteenth Amendments (Complaint, paras. 26, 28).

The plaintiffs are representative of the Jewish residents of the Williamsburgh area, who are overwhelmingly adherents of the Orthodox Jewish faith and form a closely knit community of Hasidim<sup>1/</sup>. The Williamsburgh Hasidim began to settle in substantial numbers in the area during and after World War II, with the early settlers being refugees from the Nazi Holocaust and survivors of the Nazi concentration camps. For almost 30 years, the community has developed and grown as a substantially self-sustaining and totally law-abiding group. Its present total population is approximately 30,000 (2 Tr. 95<sup>2/</sup>). It is a closely-knit community, led in all religious and spiritual

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<sup>1/</sup> A leading study on the Hasidim, titled "The Hasidic Community of Williamsburg" by Solomon Poll, was introduced in evidence at the hearing of June 20, 1974, and is found in the record as Exhibit 9.

<sup>2/</sup> Hearings were held before Judge Bruchhausen on June 17 and June 20, 1974, with evidentiary material being presented on the second occasion. By oversight, no transcript was made of the first part of the hearing of June 17. The transcript of the second segment of that day's hearing is referred to herein as "1 Tr. \_\_\_\_." The transcript of the hearing of June 20 is referred to as "2 Tr. \_\_\_\_."

matters by a rabbi and, in its other activities, by selected lay leaders. Because of distinctive religious rules and practices, which are scrupulously observed, the members of the group are immediately identifiable by their appearance and dress. They have encountered substantial discrimination and hostility from the outside world (2 Tr. 93-94), and this has caused their leaders to turn increasingly to their elected officials to secure protection of their right to live peacefully and securely and free of unlawful discrimination (2 Tr. 96; Complaint, para. 7). Over the past 30 years, other white residents of the Williamsburgh area left the region and moved elsewhere, but the Hasidic community has remained (2 Tr. 98-99). It now finds itself surrounded by neighborhoods which consist almost entirely of black and Puerto Rican residents.

It is undisputed (see Complaint, para. 8 and Answer, para. 8) that during the past 25 years, while the Hasidic community has resided in Williamsburgh, the entire area in which the Hasidim live has been included in one State Senate District and one State Assembly district.<sup>3/</sup> This recognition of the unitary nature of the com-

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<sup>3/</sup> We mention this fact here -- as we did in the district court -- not because we contend that there is any right -- constitutional or statutory -- for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history demonstrates that there could be -- and in fact was -- no reason other than race to divide the community at this time.

munity encouraged those in the Hasidic community who are seeking to improve participation in the democratic process to begin registration drives and promote voting on election day.

3. Hasidic Participation in the Electoral Process

Because Hasidim still carry over the customs and traditions of their European ancestors, they consider the democratic process strange (2 Tr. 28). In addition, as the remnants of the destruction and terror of concentration camps, they view the outside world with great skepticism and mistrust (2 Tr. 30). Much of the community believes that it must "continue with the self-imposed exile of remaining in a ghetto, of not joining the mainstream" (2 Tr. 97), and its individual members have, therefore, been most reluctant to participate in any way in the process of registration and voting.<sup>4/</sup> Certain leaders have, however, persuaded segments of the community that it is in the

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<sup>4/</sup> The descriptions summarized here are taken from the testimony given by Rabbi Albert Friedman and Rabbi Chaim Stauber at the hearing on June 20. Both are community leaders, the former being vice-chairman of the Williamsburgh Community Corporation and the individual who has led political efforts by the community, and the latter being the editor of the principal Yiddish newspaper serving the community.

group's best interest to register and to vote, but this effort to achieve participation has not been easy; it has "taken all we could do" (2 Tr. 30).

In the interests of the community, the group's leaders have dealt with elected officials and publicly supported candidates who would best serve the community's interest. The history of this support has shown that the Hasidic community is not racially or religiously discriminatory in its political preferences. In 1972, the community actively supported a Catholic candidate for the United States Congress over two Jewish opponents (2 Tr. 35). It supported a Puerto Rican woman for the job of Democratic District Leader over white opposition (2 Tr. 36, 92), as well as other non-Jewish candidates against Jewish opposition (2 Tr. 92).

#### 4. The 1972 Legislative Apportionment

Legislative apportionment in New York has been the subject of substantial litigation. In WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964), the Supreme Court held that New York's apportionment scheme was constitutionally invalid. Despite further<sup>5/</sup> litigation in the federal and state courts, a proper formula

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<sup>5/</sup> E.g., WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, aff'd 382 U.S. 4 (1965); WMCA, Inc. v. Lomenzo, 246 F. Supp. 953, aff'd sub nom.; Travia v. Lomenzo, 382 U.S. 9 and 382 U.S. 4 (1965).

that would be consistent with federal constitutional standards and with the New York Constitution's requirements was not determined. Finally, in Matter of Orans, 15 N.Y. 2d 339, 206 N.E. 2d 854 (1965), the New York Court of Appeals definitively construed the New York Constitution and established a Judicial Commission which drew up an apportionment plan to meet both sets of standards. The Commission's report was adopted by the New York Court of Appeals in 1966 (Matter of Orans, 17 N.Y. 2d 107, 216 N.E. 2d 311 (1966)), but the 1965 election had been conducted under federal court order which implemented the only one of four plans that satisfied federal constitutional standards. WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y.), aff'd, 382 U.S. 4 (1965).

The New York Legislature had, on March 15, 1965, established a Joint Legislative Committee on Reapportionment which was assigned the "task of apportioning the Senate and Assembly in accordance with the provisions of Article III of the New York State Constitution insofar as those do not conflict with the so-called one man, one vote requirement of the equal protection clause of the Fourteenth Amendment of the United States Constitution." <sup>6/</sup> On December 14, 1971, the Committee, whose Executive Director was Richard S. Scolaro (a witness at the

<sup>6/</sup> Interim Report of the Joint Legislative Committee on Reapportionment (1971), p. iii.

June 20 hearing), issued a report in which it proposed substantially the apportionment of the New York State Legislature that was adopted in January 1972. Laws of New York (1972), ch. 11.

In December 1971, the State of New York instituted an action in the District Court for the District of Columbia under Section 4(a) of the Voting Rights Act, as amended, 42 U.S.C. §1973b(a), seeking a declaratory judgment that New York was exempt from the provisions of the Act.<sup>7/</sup> On April 3, 1972, the United States consented to the entry of summary judgment in that case. Four days later, the NAACP

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<sup>7/</sup> The "automatic trigger" of the 1970 Amendments to the Act, 42 U.S.C. §1973b(b), had brought New York, the Bronx, and Kings counties within the Act's coverage because "tests or devices" had been used in those counties and less than 50 percent of voting age residents had voted in the 1968 Presidential elections. 36 Fed. Reg. 5809 (1971). Accordingly, it was the State's burden to prove that no tests or devices had been used with the purpose or effect of denying the right to vote on account of race.

requested leave to intervene. The motion to intervene was denied, and the three-judge district court granted New York State's motion for summary judgment. New York v. United States, Civ. No. 2419-71 (D.D.C.) (unreported).

The NAACP then appealed to the Supreme Court from the denial of its intervention motion. Although it affirmed the decision below, the Court indicated that, in view of the district court's mandatory retention of jurisdiction under the Voting Rights Act, the NAACP would be able to intervene and assert any claims it might make at a later date. NAACP v. New York, 413 U.S. 345 (1973). Thereafter, such intervention was allowed, and the argument was made to the three-judge district court that the failure to provide ballots in Spanish constituted the use of a discriminatory "test or device." See Torres v. Sachs, 73 Civ. 3921 (S.D.N.Y. 1973) (unreported). On January 4, 1974, without issuing any opinion, the three-judge District Court for the District of Columbia rescinded its earlier declaratory judgment and entered an order determining that New York, The Bronx and Kings counties were covered by the Act. Appeals from that order and from a later decision refusing declaratory judgment requested by New York on a different ground have been taken to the Supreme Court. New York v. United States, No. 73-1371, and New York v. United States, No. 73-1740.

Pursuant to the District Court's conclusion, the 1972 apportionment was submitted on February 1, 1974, to the Attorney General of the United States under Section 5 of the Voting Rights Act. 42 U.S.C. §1973c. . On April 1, 1974, in a letter to the Office of the Attorney General of New York from Assistant Attorney General J. Stanley Pottinger, the Department of Justice disapproved the 1972 apportionment insofar as it affected certain election districts in New York and Kings counties. Although the NAACP tried to persuade the Department of Justice that there had been racial gerrymandering in those counties in the past and that lines were deliberately drawn for the purpose of discriminating against minorities, the Assistant Attorney General made no such findings. The only basis for disapproval was that the State had failed to meet its burden of proving that the apportionment would not have the effect of abridging the right to vote on account of race. As to State Senate and Assembly districts in Kings county -- which is what this case involves -- the Department of Justice found the following (Complaint Exhibit VI, p.2):

Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55

and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. As with the congressional plan we know of no necessity for such configuration and believe other rational alternatives exist.

5. The Response of New York State Authorities

Although Section 5 of the Voting Rights Act authorizes the State to obtain a judicial determination regarding any change in voting practice or procedure which it seeks to implement, even if the Attorney General disapproves of such change, the New York State authorities did not institute any proceeding to this end.<sup>8/</sup> Their view was stated in the subsequently issued report of the Joint Legislative Committee on Reapportionment (Complaint Exhibit VII, pp. 2-3):

While the Joint Legislative Committee on Reapportionment does not subscribe to the ruling of the Justice Department as expressed in the April 1 letter of Assistant Attorney General J. Stanley Pottinger, the exigencies of time require that new legislation be enacted to satisfy immediately the objections of the

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<sup>8/</sup> Judge Bruchhausen's opinion says that "several groups sought to appeal the ruling of Mr. Pottinger, but met with failure when their actions were dismissed by the District Court for the District of Columbia" (Opinion, p.3). This assertion must refer to an action filed on behalf of four state legislators, whose complaint was dismissed on the ground they had no standing. Griffith v. United States, 74 Civ. No. 648, D.D.C.

Department of Justice and thereby permit an orderly primary and general election to take place in New York and Kings Counties in 1974.

The opinion that the Department of Justice was wrong was held by Mr. Scolaro, as well as by the members of the Joint Legislative Committee (2 Tr. 129, 133-134). However, because the legislature felt "forced to the wall by reason of time" (2 Tr. 139), the committee drew up the plans which are substantially those under challenge in this case.

In order to achieve these objectives, Mr. Scolaro had "one very lengthy meeting in person" and many telephone conversations with Department of Justice attorneys to learn what criteria would satisfy the Department (2 Tr. 141). Although he was never given a specific percentage figure, he and other staff members were told that it would be necessary to devise two more Senate districts and two more Assembly districts with "substantial non-white majorities" (Complaint, Exhibit VII, pp. 5, 7; emphasis added). The Assembly district in which the entire Williamsburgh Hasidic community was located under the 1972 apportionment had a non-white population of 61.5%, but the Department of Justice indicated that this was not sufficiently "substantial" (2 Tr. 131, 144). Scolaro then inquired how much higher the non-white percentage would have to be (2 Tr. 144):

I said how much higher do you have to go?

Is 70 percent all right?

They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within that district.

I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents.

I got the feeling, and I cannot vouch for this as a matter of having been specifically said, but I left that meeting indicating that 65 percent would be probably an approved figure.

Scolaro also testified that, as a result of his meetings and discussions, "I thought it was logical for me to assume anything under 65 would not be acceptable" (2 Tr. 145).

In his discussions with the Department of Justice, Scolaro pointed out that if the white residents of the area had to be fragmented to meet the higher percentage demanded, the Hasidic community would no longer be "contained as an integral unit" (2 Tr. 163). He concluded that the Department of Justice had no understanding of that problem and attorneys in it did not even know where the community resided and where Williamsburgh was located (2 Tr. 164). In trying to preserve the Hasidic community as a unit in the 57th Assembly District, the Committee could come up with no greater percentage of non-whites in that district than 63.4 percent. Scolaro testified (2 Tr. 160):

[I]t was our determination at that time, after all of our consultation with the Justice Department, that increasing a percentage from 61.5 to 63.4, would not be acceptable to effect compliance....

Accordingly, the reapportionment plan under which the Hasidic community was divided -- almost in half -- for Senate and Assembly district purposes was recommended and approved by the legislature as Chapters 588, 589, 590, 591 and 599 of the Laws of New York of 1974, whose constitutionality is being challenged in this action. Scolaro's testimony was (2 Tr. 155-156; emphasis added):

Q. So that your reason for dividing the Hasidic community was to effect compliance with the Department of Justice determination, and the minimum standard they impose -- they appear to impose?

A. That was the sole reason. We spent over a full day right around the clock, attempting to come up with some other type of districting plan that would maintain the Hasidic community as one entity, and I think that evidenced clearly by the fact that that district is exactly 65 percent, and it's because we went block by block, and didn't go higher or lower than that, in order to maintain as much of the community as possible.

6. The Effect of the 1974 Apportionment

There was no advance warning to the Hasidic community that it would be cut in half by this apportionment on account of the race of its members. Witnesses have testified that the effect of the announcement was "devastating, ... a direct slap in

the face" (2 Tr. 31). Rabbi Stauber, editor of the community newspaper, testified that many people had suggested to him that this was retribution upon the community "for really having the guts and having the clout to be a considerable force and factor in the political life of the City" (2 Tr. 96), and that others -- reflecting the view of the skeptics -- had said that "we are simply being penalized for taking a stance in politics, for not knowing our place, so to speak, remaining in Synagogues, instead of coming out and really turning out the vote" (2 Tr. 97).

As a result, "the voting drive has stalled" (2 Tr. 34). The community is now saying "why come out again and vote for these very people or any other" (2 Tr. 100). The morale of the community "has sagged to an all time low" (2 Tr. 100). All the witnesses who testified agreed that the harm done if even a single election were conducted under the 1974 lines would be irreparable to the Hasidic community's political awakening (2 Tr. 13-14, 34, 85-86, 100).

#### 7. Litigation

On June 11, 1974 -- less than two weeks after the 1974 apportionment was enacted -- this action was instituted. A hearing was held, on ample notice, before Judge Bruchhausen on June 17, 1974 -- the first day for circulating nominating

petitions under the State's "political calendar." Counsel for all parties were present, as well as counsel for the NAACP, which had been served with the papers because of its obvious interest in the case. Plaintiffs requested a temporary restraining order that would maintain the status quo and not authorize the gathering of signatures in questionable districts during the pendency of the litigation. Judge Bruchhausen first said he would enter a temporary restraining order and directed counsel to agree on its terms. After a recess, counsel for the Kings County Republican County Committee entered an appearance and argued that since petition-gathering had begun that morning the work of many Party members would be wasted if an order were entered (1 Tr. 10). On determining that counsel was opposed to the temporary restraining order, Judge Bruchhausen said, "Once, once in awhile, I reverse myself. I think I have heard enough pro and con. I will not enter the TRO" (1 Tr. 11).

A hearing was held on June 20, 1974, on plaintiffs' motion for preliminary injunction. Evidence was taken, and full cross-examination was permitted. Under an accelerated briefing schedule, the full initial briefs were filed with the district court by June 29, 1974. In addition to the request

for a preliminary injunction, plaintiffs moved, on the basis of the evidence at the hearing, for summary judgment. The Attorney General of the United States also moved to be dismissed as a party defendant, although a representative of the United States Attorney's office was present throughout both hearings and was afforded full opportunity to argue, offer evidence, <sup>9/</sup> and cross-examine.

On July 1, 1974, Assistant Attorney General Pottinger issued a letter approving the 1974 apportionment with an explanatory memorandum which stated why the plan was being approved even though it did not benefit Puerto Rican voters. With regard to the claims of the plaintiffs, the Memorandum stated that there was no indication in the history of the Fifteenth Amendment or the Voting Rights Act "that Hasidic Jews or persons of Irish, Polish or Italian descent are within the scope of the special protections defined by the Congress in the Voting Rights Act."

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<sup>9/</sup> Judge Bruchhausen never ruled on the motion to dismiss, so it is not technically before this Court. We note, however, that there is clearly jurisdiction over the Attorney General under 28 U.S.C. §1343(3), on the allegation of this complaint because the Attorney General has caused a deprivation of federal constitutional rights "under color of State laws." See, e.g., Aguayo v. Richardson, 473 F.2d 1090, 1102 (2d Cir. 1973); Rider v. Richmond Metropolitan Authority, 359 F. Supp. 611, 622 (E.D.Va. 1973); Hough v. Seaman, 357 F. Supp. 145 (W.D.N.C. 1973).

When Judge Bruchhausen failed to rule on the pending motions by July 12, 1974, the plaintiffs sought relief from this Court on the ground that the closing date for nominating petitions was July 17 and they would be seriously harmed if there were no judicial action by that time. This Court dismissed that appeal on July 16, 1974, and denied a request for interlocutory relief, on the ground that there was still no appealable order that had been issued by Judge Bruchhausen. The denial was, however, "without prejudice to renewal." United Jewish Organizations of Williamsburgh v. Wilson, No. 74-1943.

On July 25, 1974 -- a Friday -- Judge Bruchhausen filed his opinion and order; counsel did not learn of that decision until the opinion arrived in the mail on Monday, July 28, 1974. The district judge ruled that the plaintiffs' claim was "untenable" because the approval by Assistant Attorney General Pottinger on July 1, 1974, made the apportionment lawful under the Voting Rights Act and because the plaintiffs are not constitutionally entitled to "separate community recognition" in the apportionment process.

# INTRODUCTION AND SUMMARY OF ARGUMENT

The uncontested facts of this case present a very stark and simple framework for the legal issues. The plaintiffs are voters who have been assigned to two State Senate and two State Assembly districts under an acknowledged formula designed to ensure that not more than 35 percent of the total population of any of the four districts is of their race. As a direct result of that 35 percent limitation, and solely because of that limitation, they have been divided between districts so that their voting power is minimized and diluted. If the plaintiffs' skin were black, brown, red or yellow, the legislation would be so totally and flagrantly unconstitutional that it could not withstand a moment's reflection. It has, however, been approved by the Department of Justice and, now, by a Senior United States District Judge because the plaintiffs' race is white. We submit that the Fourteenth and Fifteenth Amendments and, indeed, the entire democratic tradition of this country are violated by this action. Racial criteria and racial quotas are inherently suspect, and when they cannot be shown as necessary to overcome the effects of past discrimination, they are unqualifiedly unconstitutional. Nowhere should this be more true than in the electoral process, where no legitimate purpose is served

by racially motivated action other than to pit one race against another and to promote racial partisanship.

There was, and continues to be, a strong need for vigorous federal enforcement of the individual's constitutional right to cast his or her vote. The history of efforts to achieve that right, culminating in the Voting Rights Act of 1965 and its enforcement, marks a glorious chapter in the ongoing drama in which equal rights are being achieved for all inhabitants of the land. But the attempt being made here by a misguided -- even if benignly motivated -- Department of Justice is an excess that the courts must check if the struggle for equality is not to be turned into a battle for supremacy. Invidious and deliberate attempts to minimize the votes of blacks and Puerto Ricans are condemned by all citizens, and the plaintiffs in this case -- themselves victims of the most brutalizing discrimination known to the history of man -- join that condemnation. But when the banner of equality is carried to justify restrictions which are invidious, even if not directed against blacks and Puerto Ricans, the ultimate aim for which decent citizens strive has been perverted.

Underlying the approach taken here by the NAACP and by the Department of Justice is a short-sighted and ill-conceived

notion that should be bared at the outset. It is, simply stated, that the best way to achieve equality for minorities in the United States is to elect more black, Puerto Rican, Indian or Chicano executives and legislators, and that the only way to reach this goal is to maximize minority population in each electoral district so that each has a comfortable majority of black or other minority voters -- but not so large a majority that such votes, if cast along racial lines, would be wasted. The optimum figure is, according to this approach, somewhere between 65 and 70 percent. Such a majority takes due account for the fact that a smaller percentage of the total black and Puerto Rican population actually votes, and it virtually insures the election of a minority-race candidate so long as racial preference is the principal criteria. If, therefore, a district has more than 65-70 percent of black voters, its minority percentage is "unduly concentrated"; if it has less, it is "significantly diffused."

The first and major flaw in this approach relates to the assumption that race is, now and forever, the principal determinant of choice in the voting booth. The history of this country has demonstrated time and again that what was once believed to be inevitable voter prejudice turned out not to exist at all. It was surely thought a century ago that an

Italian or an Irishman or a Jew could never be elected to public office in any district where his particular national or religious affiliation was in a small minority. By the beginning of the Twentieth Century, this notion was being disproved, and it is now totally discredited. The same canard regarding religious affiliation attached to national candidates who were Catholics. From the time of "Rum, Romanism and Rebellion" through the Presidential candidacy of Al Smith, it was said that a Catholic could not be elected President. In 1960, the country again proved that those who underestimated the egalitarianism of Americans were dead wrong, and an accepted political proverb is now a derided relic of a bygone time.

There is ample proof today of the invalidity of the premise that black candidates may be elected only where there is a comfortable majority of black voters. Massachusetts is, of course, a striking example. Of a total Voting Age Population in 1970 of 3,955,000, the number of voting age blacks was 115,000 -- a percentage of 2.97. Yet Massachusetts has elected a black United States Senator.

On the following page we present a table of American cities of more than 50,000 population which have a black population of more than 20 percent and have elected a black mayor. These figures, compiled by the Joint Center for

<u>City</u>	<u>Total Pop.</u>	<u>Total Black Pop.</u>	<u>% of Pop. Black</u>	<u>Total VAP</u>	<u>Black VAP</u>	<u>% of Black VAP</u>
Berkeley, Calif.	116,716	27,421	23.5	95,804	19,397	20.2
Compton, Calif.	78,611	55,781	71.0	46,022	30,375	66.0
Richmond, Calif.	79,043	28,633	36.2	54,821	17,272	31.5
Atlanta, Ga.	496,973	255,051	51.3	354,642	167,796	47.3
E. St. Louis, Ill.	, 69,996	48,368	69.1	44,654	28,324	63.4
Gary, Ind.	175,415	92,695	52.8	115,209	57,212	49.7
Detroit, Mich.	1,511,482	660,428	43.7	1,072,953	423,032	39.4
Pontiac, Mich.	85,279	22,760	26.7	56,538	13,385	23.7
East Orange, N.J.	75,471	40,099	53.1	57,897	27,244	47.0
Newark, N.J.	382,417	207,458	54.2	253,236	123,093	48.6
Raleigh, N.C.	121,577	27,594	23.0	89,872	19,150	21.3
Cincinnati, Ohio	452,524	125,070	27.6	326,882	79,829	24.4
Dayton, Ohio	243,601	74,284	30.5	175,436	47,593	27.1

Political Studies, demonstrate that an electoral district need not have a black population of 65-70 percent to elect a black. If that were true, East St. Louis would be the only city in the United States with such an official.

A second fundamental flaw in the premise on which the Department of Justice is operating is the notion that a high percentage of blacks in a district necessarily constitutes "undue concentration," and a lower percentage amounts to "substantial diffusion." By the very nature of a regional election-district system, as opposed to state-wide proportional representation, districts will vary in minority-race population depending on residential patterns. Is it surprising that the Bedford-Stuyvesant area of Brooklyn has an "undue concentration" of blacks when it is well known that the residential pattern is such that virtually all its residents are black? The inability of the Department of Justice to grasp this simple proposition emerges from its Memorandum of July 1, 1974, in which, over several pages, it tries to explain why the 1974 apportionment is being approved even though no substantially Puerto Rican district is created by that apportionment. The geographic dispersal of the Puerto Rican residents of Kings County, who make up about 10 percent of its total population, explains that result.

A third major flaw -- and, we submit, an egregious and demeaning one -- is the assumption that only black or minority-race legislators can represent black or minority-race interests. If the history of Congressional action over the past decade proves anything, it establishes firmly that the civil rights of minorities can and will be protected by legislation and enforcement even if there is an overwhelmingly white Congress and a white Executive. Is it probable -- to cite the facts of this case -- that a legislator representing a district that is 61.5 or 63.4 percent black will overlook or ignore the interests of his black constituency, and that it is, therefore, necessary to have a district that is at least 65 percent black so that a black legislator will be elected?

There are, of course, extreme situations in which bad-faith efforts are made to drown out a black constituency or so to minimize its voting power that elected representatives will be able safely to ignore their minority-race constituencies. To provide against these eventualities, the Fifteenth Amendment and the Voting Rights Act have been construed as covering minimized or diluted votes. But to carry it to the point where a 61.5 percent majority must, by operation of law, be turned to a 65 percent majority is to infringe upon the

rights of others and threaten the foundation of our democracy.

ARGUMENT

I

NO RACIAL QUOTA IS CONSTITUTIONALLY PERMISSIBLE  
IN THE ABSENCE OF A FINDING, BASED  
ON EVIDENCE, THAT IT IS NECESSARY  
TO CORRECT PAST RACIAL DISCRIMINATION

There can be no question but that this case involves a racial "quota." Under instructions from representatives of the Attorney General of the United States, the state legislature drew district lines so that not more than 35 percent of the residents would be white. The legislature did not do so because it was obliged to correct some past act of discrimination that could only be cured by a race-conscious corrective. It acted as it did only because this was the way to obtain the required seven "substantial" minority-race Assembly districts and the required three "substantial" minority-race Senate districts.

We need hardly cite the many cases that have reaffirmed the proposition that racial considerations and distinctions are inherently suspect. We do, however, note that racial considerations have been approved "to correct past discriminatory practices." United States v. Wood, Wire & Metal Lathers Union, 471 F.2d 408, 413 (2d Cir), cert. denied, 412 U.S. 939 (1973),

and the many cases there cited; Rios v. Enterprise Association Steamfitters Local, Docket Nos. 73-2110, 73-2266, decided June 24, 1974, pp. 4379-4381, and cases cited at 4380-4391. This Court has applied that principle, as well, to actions against government agencies, where suit is brought not under Title VII of the Civil Rights Act of 1964 but under 42 U.S.C. §1983 and, as in this case, 28 U.S.C. §1343(3). Vulcan Society of the N.Y. City Fire Dept. v. Civil Service Commission of New York, 490 F.2d 387, 398-399 (2d Cir. 1973); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1340 (2d Cir. 1973). There again, the remedies permitted were needed "to cure past discrimination," and even then, in dealing with hiring quotas, the Court said that it would "approve such relief somewhat gingerly." 482 F.2d at 1340.

The fact that quotas or race-consciousness is permitted only when it is needed to cure past discrimination was emphasized in Bridgeport Guardians by this Court's reversal of that part of the order which imposed quotas "above the rank of patrolman." The Court said that if quotas were imposed in those circumstances, it would "obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone." 482 F.2d at 1341. In terms that are fully applicable

here, the Court continued (ibid):

The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.

As District Judge Weinfeld wisely observed in his opinion in the Vulcan Society case, later affirmed by this Court (360 F. Supp. 1265, 1278 (S.D.N.Y. 1973)):

Adjustments based upon racial classification, however well-intentioned, contain within themselves the seed of further divisiveness regardless of their benevolent purpose.

The record in this case supports these observations. Members of the Hasidic community, as well as other witnesses familiar with the area, testified that the attitude which resulted in this apportionment has the effect of "pitting one race against another race" (2 Tr. 63), that it was turning the election "into a racial issue" (2 Tr. 105, 112).

Judge Bruchhausen said that the racial considerations involved in this case were permissible because remedies "based on race" were approved "to correct a wrong" in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). But, as the Supreme Court very recently reemphasized in Milliken v. Bradley, 42 U.S. Law Week 5249 (decided July 25, 1974), it was an essential part of the Swann case that "the nature of the violation determines the scope of the remedy." 402 U.S.

at 16. As the Court said in the Milliken case, "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." 42 U.S. Law Week at 5258.

There is no claim here that the 65 percent nonwhite population figure was needed to "restore" something that had been unconstitutionally or unlawfully taken from black and Puerto Rican residents of Kings County by prior apportionments. Mr. Pottinger deliberately made no finding that there was an unlawful purpose in the 1972 apportionment. Nor did he, notwithstanding the NAACP's claim, find discrimination at any time in the past. Not only is there an absence of proof on the issue of past racial discrimination; there is a judicial finding to the contrary. The allegation of racial discrimination in apportionment was actively litigated in the New York courts, where a finding was made that there was no racial gerrymandering. Schneider v. Rockefeller, 31 N.Y. 2d 420, 293 N.E. 2d. 67 (1971); see 2 Tr. 125.

The absence of any evidence or finding of past discrimination distinguishes this case from decisions such as Beer v. United States, 374 F. Supp. 363 (D.D.C. 1974), and City of Richmond v. United States, Civ. Action No. 1718-72 (D.D.C. 1974),

where strong records were made of past state action deliberately designed as "barriers to full political participation by minorities." 374 F.Supp. at 374.<sup>10/</sup> In such circumstances, it might be proper -- if an appropriate remedy could be constructed -- to set race-conscious goals designed to elect black or other minority legislators. The worst that could be said of the recent history of voting in New York is what Judge Stewart found in Torres v. Sachs, supra -- i.e., that the ballot discriminated against Puerto Ricans because it was not translated into Spanish. The irony of the remedy invoked here by the legislature under the direction of the Attorney General is that it does nothing to "restore" to Puerto Rican voters the harm suffered by that discrimination. Rather than redressing an injury to Paul by borrowing from Peter to pay Paul, it redresses the injury to Paul by borrowing from Peter and paying John.

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<sup>10/</sup> In the City of Richmond case there was not only a history of discrimination against black voters, but substantial evidence that the purpose of the challenged change was "to keep the black population from gaining control of the city." (Opinion, p.8 and note 29).

Finally, there is nothing in the language or history of the Voting Rights Act to support a suggestion that the statute confers some "affirmative action" obligation to maximize minority-race voting power. The statutory language tracks the Fifteenth Amendment, which does no more than prohibit denials or abridgements of the right to vote on account of race. Although it is true that the Attorney General, in enforcing Section 5, may cast the procedural burden of proving that there is no denial or abridgement of the right to vote on the governmental agency seeking to institute the change (Georgia v. United States, 411 U.S. 526 (1973)), the shift of burden may not be used -- as the Department of Justice has used it here -- to require the State to prove that there are no alternatives that could produce more minority-race legislators. That, essentially, is what was done here, and it constitutes a violation of the Fifteenth Amendment. Indeed, if the Voting Rights Act expressly said that the Attorney General may reject any reapportionment that does not maximize the voting power of black citizens or other minorities, it would, we submit, be unconstitutional under the Fifteenth Amendment. It does not, of course, say that, and we believe it cannot fairly be construed in that manner.

II

IRRESPECTIVE OF PAST DISCRIMINATION,  
RACIAL GERRYMANDERING VIOLATES THE  
CONSTITUTION AND THE PRINCIPLES OF  
OUR DEMOCRATIC SOCIETY.

We have, in the first section of our Argument, presented our position on the premise that affirmative relief by way of quotas would be no less permissible in voting than it would be in public education, public or private employment or housing. In fact, however, we submit that a much more pernicious agent is at work if race-consciousness is once allowed in the electoral process than if it is authorized in other aspects of contemporary life.

The leading case on the subject of racial gerrymandering is Wright v. Rockefeller, 376 U.S. 52 (1964). The plaintiffs there challenged Congressional redistricting in New York County on the theory that the districts were designed to reduce the representation of racial minorities. The Supreme Court agreed with the finding of a majority of a three-judge district court that there had been a failure of proof -- i.e., that the plaintiffs had not established the factual premise of their argument, that is, that the district lines were racially motivated. It clearly implied, however, that on proper proof such a claim could be heard and sustained.

In a separate opinion (dissenting on the facts), on which many later judges have relied, Mr. Justice Douglas pointed out the great evils of racial gerrymandering (376 U.S. at 67):

When racial or religious lines are drawn by the State, the multiracial , multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

The "democratic ideal" which Mr. Justice Douglas referred to is the heart of our free, yet diverse, society. This country has, at least for the past two decades, sought in all the phases of society, to surmount racial differences, not to exaggerate or intensify them. In a case decided ten years ago, Anderson v. Martin, 375 U.S. 399 (1964), a unanimous Supreme Court struck down, as plainly unconstitutional, a state-supported mechanism that encouraged voting on the basis of race and that would, in the words of Justice Douglas, have resulted in the election of "the best racial or religious partisan." The Court's opinion noted that the racial designation on the ballot which was at issue in that case would operate in favor of a black candidate "in a State or voting district where Negroes predominate," but held that it was impermissible for the State

to "induce racial prejudice at the polls." 375 U.S. at 402.

Later decisions have reaffirmed the proposition that "[f]ramers of voting districts are required to be color blind." Ince v. Rockefeller, 290 F. Supp. 878, 884, (S.D.N.Y. 1968). E.g., Gaffney v. Cummings, 412 U.S. 735, 751 (1973), quoting from Fortson v. Dorsey, 379 U.S. 433, 439 (1965); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-160 (1971); Mann v. Davis, 245 F. Supp. 241, 245 (E. D. Va.), aff'd, 382 U.S. 42 (1965) ("No line may be drawn to prefer by race or color."); Kilgarlin v. Martin, 252 F. Supp. 404, 437 (S.D. Tex. 1966), rev'd on other grounds, 386 U.S. 120 (1967); Cousins v. City Council of Chicago, 466 F.2d 830, 842-843 (7th Cir. 1972), cert. denied, 409 U.S. 893 (1973); Ferrell v. Oklahoma, 339 F. Supp. 73, 83 (W.D. Okla), aff'd, 409 U.S. 939 (1972); <sup>11/</sup> Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1972); Howard v. Adams County Board of Supervisors, 453 F.2d 455, 457-460 (5th Cir. 1972); Dobson v. Mayor

<sup>11/</sup> The three-judge district court said:

If the Legislature were constitutionally mandated to be other than color-blind in this area what about the Indians and other minority groups? Furthermore, if a district be carved especially for the blacks (permissible but not required) who can say that it will long remain thus? We judicially notice that through changes in housing patterns, urban renewal, slum clearance, public housing and other factors the minority races are on the move in more ways than one.

and City Council of Baltimore, 330 F. Supp. 1290, 1296 (D. Md. 1971). By the undisputed testimony in this case, the lines here were drawn not by those who were "color-blind," but by individuals whose first and principal criterion was, by the compulsion of a federal agency, the race of the voters being placed in each of the districts. On its face, the reapportionment was flagrantly unconstitutional.

All we have on this record is the bare demand for a racial quota. To insure that a non-white representative shall be elected from the assembly and senate districts involved in the litigation, each district must contain at least 65% nonwhite residents. On what basis is the demand for such representation made? Are there less black assemblymen in Brooklyn than the proportional black population of that borough would warrant? In fact, for a black population of approximately 23%, there appears to be 23% black representation; of 21.5 Assembly Districts, five have black assemblymen. The redistricting mandated by the Department of Justice is, apparently, designed only to maximize black representation by increasing it to 33%, not to reflect actual proportional shares. <sup>12/</sup>

12/ For some artificial reason explained by no regulation, directive, letter or informal communication, the blacks and Puerto Ricans of Brooklyn are lumped together to provide a total non-white population figure of about 33%. But the 1974 reapportionment has, if anything, worsened the opportunities of the Spanish-speaking citizens. See the Department of Justice Memorandum of July 1, 1974.

In Kilgarlin v. Martin, 252 F. Supp. 404, 437 (1966), rev'd on other grounds, 386 U.S. 120 (1967), the district court said: "[A] plan drawn to favor or satisfy the demands of a particular racial group or element would be seriously constitutionally suspect, just as it would be unlawful to draw a plan intentionally to dilute their votes." This plan does not merely "satisfy the demands of a particular racial group"; it does so at the vital expense of another ethnic group that deserves equal sympathy and at least as much in the way of affirmative action to cure society's inequities.

In the Introduction to this Argument we pointed out the vital flaws that exist in the assumption made by the Department of Justice and by the NAACP. Those factors simply are not present in the areas of public education -- where the question is how to assign students of different races, all of whom are enrolled in the public school system. Nor are those considerations present in the area of public housing, where this Court recognized that race could be taken into account to overcome the inequalities that result even from private discrimination. In Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), it was alleged that the effect of constructing a public housing project in Norwalk, when combined with private discrimination against blacks and Puerto Ricans, resulted in driving the minorities out of

Norwalk. This Court noted that to overcome this consequence, it might be necessary to provide special treatment for the blacks and Puerto Ricans displaced, but that in the circumstances that was needed "for the purpose of achieving equality." 395 F.2d at 932. In this situation, unlike racial gerrymandering, the special treatment is not at the expense of other poor persons who are of a different race. Nor does the special treatment for blacks and Puerto Ricans have the effect of encouraging the recognition of racial differences. And it does not "pit one race against another race," as does the drawing of electoral lines on a racial basis.

Similar factors underlie Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973), which permitted race to be taken into account in assignment to a public housing project, as one of many factors, only if it were absolutely essential to carry out the statutory obligation -- consistent with the constitutional policy -- of securing integrated housing. The burden to justify such race-consciousness, said the Court, "is a heavy one" -- met only by "convincing evidence" that color-blindness "would probably lead to eventual ghettoization of the community." 484 F.2d at 1136.

This case is, of course, far from that standard. Could it remotely be suggested that the difference between 61.5 and

65 percent nonwhite population "would probably lead" to the abridgement of the right to vote on account of race? Entirely apart from that distinction, however, it must be clear that whereas the purpose of race-consciousness, if it is permitted in the Otero situation, is to preserve the possibility that blacks and whites may live as neighbors, the effect of the race-conscious decision in these circumstances is to achieve a certain form of supremacy of one race over the other -- to ensure that the two Senate and the two Assembly districts in which the Hasidim reside will be represented by black legislators. The difference is between a goal that is statutorily and constitutionally encouraged -- racial integration -- and one on which the Constitution is and should be totally neutral -- the race of a particular representative from a particular district.

We submit, in concluding this point, that when an electoral change is designed to silence a racial minority or when, irrespective of express design, that purpose may be inferred from the necessary effect of the electoral change, it is proper to reject it under federal law and the Constitution. But "affirmative action" -- whatever its proper role in other areas -- has no place in voting, and this attempt to implement it by the Attorney General of the United States, using the New York legislature as his unwilling agents, should be turned back promptly.

III

THE PLAINTIFFS MAY BRING THIS ACTION  
TO ENJOIN THE APPLICATION OF UNCONSTITUTIONAL LAWS AGAINST THEM.

The district court considered this case on its merits and did not, therefore, pass on the arguments made below -- principally by the NAACP in its amicus brief -- that the plaintiffs have no "standing" to maintain the action. Nonetheless, since the claim may be made here, we address it in this initial brief.

To the extent that the argument is cast in terms of "standing," it is plainly without merit. The plaintiffs have been hurt -- demonstrably so -- by their segmentation into separate Assembly and Senate districts. They have standing in the same sense that any plaintiffs in a reapportionment suit have standing -- their vote has been diluted and minimized. In White v. Regester, 412U.S.755 (1973), plaintiffs who claimed that their right to vote had been diluted by a multi-member districting plan were upheld by the Supreme Court. The personal harm to these plaintiffs is no less than the harm to the plaintiffs in White v. Regester.

The nub of the argument, as we understand it, is that this action is, indirectly, a challenge to the Assistant Attorney General Pottinger's decisions of April 1, 1974, and

July 1, 1974 and those decisions by virtue of Section 5 of the Voting Rights Act, may be challenged only in the United States District Court for the District of Columbia. This argument is erroneous because it misstates what we are challenging and misapprehends the Voting Rights Act.

The plaintiffs' attack is on the 1974 apportionment legislation. We contend that those laws were enacted by unconstitutional standards and for unconstitutional purposes, and we seek their invalidation. While we would be content with the 1972 apportionment, we do not ask it as the exclusive remedy. Nor do we ask for a declaration that it is valid. We would be equally content if the 1972 law were invalidated along with the 1974 law, and the election were conducted under the 1966 lines. Similarly, we would be content if the Court ordered some other remedy -- possibly the apportionment that would have placed the Hasidim in the 57th Assembly District with a 63.4 percent nonwhite population. But we maintain that the present scheme is invalid.

The fact that our legal argument, if it is correct, could have been asserted by the State of New York if it had not believed that the "exigencies of time" foreclosed a judicial challenge should not bar us from asserting that same argument in this suit questioning the validity of subsequent legislation. To be sure, if we are right, Mr. Pottinger was wrong on April 1,

1974 and on July 1, 1974. Indeed, the State of New York may still choose to challenge his earlier determination in an appropriate proceeding. But the very least what we are entitled to if we are right is to be relieved of the effect of the 1974 laws.

Finally, we note that with respect to the 1974 reapportionment, there can be absolutely no question of the plaintiffs' right to maintain an action to enjoin it. Section 5 specifically provides: "[N]either the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure." The Attorney General has indicated his nonobjection to these laws, and the plaintiffs are now in court with precisely the kind of suit that Section 5 says is not foreclosed.

IV

IT IS NOT TOO LATE TO GRANT  
RELIEF FOR THE 1974 ELECTION

If, as we have argued above, the plaintiffs are correct in their constitutional claim, relief should be granted as promptly as possible. Our Statement outlines the irreparability of the harm to the Hasidic community and to the future of its participation in the electoral process if this election is conducted with the community divided in half. This is not a situation of a group which has been denied full voting rights in the past and may just have to wait until the next election to obtain full relief, or of an individual whose opportunity to be elected might have to be delayed by one term of office because to grant relief immediately would unduly disrupt the entire process. What we have here is a possible death-blow to the political life of a newly awakened community. There was no evidence presented in the district court that cast any doubt on this showing of irreparable harm. Nor was it shaken on cross-examination. And Judge Bruchhausen made no

finding whatever that cast any shadow on this conclusion.

If, as we believe, the harm is substantial and the constitutional right clear, the only ground for denying relief would be that the election is too close in time and an equitable remedy would be disruptive. See Shapiro v. Maryland, 336 F. Supp. 1205, 1211 (D. Md. 1972); Lisco v. McNichols, 208 F. Supp. 471, 478 (D. Colo. 1962); Pohoryles v. Mandel, 312 F. Supp. 334, 341 (D. Md. 1970). But this is not a case, as were Shapiro and Pohoryles, where the plaintiffs slept on their rights until close to the election. Suit was instituted here less than two weeks after the legislation was enacted, and at every stage the plaintiffs have tried to hurry the proceedings along. Nor is this a case, as was Lisco, in which there are no alternative remedies available that would keep disruption to a minimum. If the plaintiffs were to be given all the relief they request at the present time, only four districts out of the hundreds in the New York Legislature would be affected. And while we are now very close to the date for the primary vote, the actual Election Day is still three months away. There is, therefore, ample time to prescribe a special primary in these districts and have the general election conducted on November 5.

In the landmark reapportionment case of Reynolds v. Sims,

377 U.S. 533 (1964), the late Chief Justice Warren said, "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585. This is not an "unusual" case, and all the principles of equity are on the side of the plaintiffs, who have expeditiously invoked the assistance of the courts and sought, at every turn, to preserve the status quo. Refusing to enjoin the election would in effect punish plaintiffs for a legislative decision which, beyond their control, was made at the last minute. Relief would be denied, not because plaintiffs were unable to show their right to relief. To the contrary, even though a right to relief has been shown, relief would be denied because of an eleventh-hour situation created by the defendants themselves.

This Court clearly has the power to enjoin the election. In Gilmore v. Greene Co. Democratic Party Executive Committee, 368 F.2d 328 (5th Cir. 1966), the Fifth Circuit, in a per curiam opinion, and with practically no discussion, enjoined an election because a constitutionally sound ballot form could not be prepared by the election date. See also Thigpen v. Meyers, 231 F. Supp. 938 (W.D. Wash. 1964).

The most obvious available remedy is to direct the State, and particularly Mr. Scolaro, to produce the plan that was drawn up and rejected, under which the Hasidic community would have been united in the 57th Assembly District with a 63.4 percent nonwhite majority, and any similar plan relating to the Senate districts. Mr. Scolaro's testimony was that such a plan could be reconstructed "within two to three days." Implementation of this plan would avoid the difficulty of using the 1972 lines -- which the Attorney General has disapproved -- while still granting appropriate relief to the plaintiffs.

#### CONCLUSION

This case presents an unfortunate situation in which, for benign motives, officials have discriminated against a group whose race may be that of the majority but who are otherwise subjected to substantial hardship. They have done so by administering a racial quota, and the evils of such a quota were eloquently described by Professors Bickel and Kurland in the brief they filed in the Supreme Court of the United States in DeFunis v. Odegaard, 94 S.Ct.1704(1974), which presented a closely related issue:

A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. A racial quota derogates the human dignity and indivi-

duality of all to whom it is applied. A racial quota is invidious in principle as well as in practice .... The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

The judgment of the district court should be reversed with instructions to enter summary judgment and appropriate permanent relief for the plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 1974, I caused to be served two copies of the Brief for Appellants to each of the following, by hand delivery: John Proudfit, Esq., Room 4826 Two World Trade Center, New York, N. Y. 10047, Erwin L. Herzog, Esq., Office of the Corporation Counsel, 1645 Municipal Building, New York, N. Y. 10017, David Trager, Esq., United States Attorney, Federal Courthouse, 225 Cadman Plaza East, Brooklyn, N. Y. 11201, Eric Schnapper, Esq., Suite 2030, 10 Columbus Circle, New York, N. Y. 10019, and S. Michael Scadron, Esq., Room 914, 550 11th Street, N.W., Washington, D. C.



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